IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

J. RONI FREUND & **MARY S. MATHEWSON,** *Petitioners,* v. **DENIS McDONOUGH,** in his capacity as Secretary of Veterans Affairs, *Respondent.*	)	Vet. App. No. 21-4168

PETITIONERS' RESPONSE TO SECRETARY'S APRIL 11, 2022, SUPPLEMENTAL MEMORANDUM

On March 10, 2022, the Court issued an order ("Order"), in which it: (1) outlined the Petitioners' individual and class contentions in this case, the responses that the Secretary had provided to those contentions (or not), and at least some of the Court's outstanding questions for the Secretary; and (2) required the Secretary to file a high-ranking Department of Veterans Affairs ("VA") official's affidavit or affidavits to address the Order's enumerated questions.

Some of the Order's questions pertain to legal positions that, as of March 10, 2022, the Secretary had chosen to advance as to this case's Request for Class Action ("RCA") presenting a live case or controversy. *See* Order at 4–5 (Question 3; "Has VA sent a notice letter to either or both groups identified in response to Questions 1 and 2 above? If not, why is the Secretary contending that the [RCA] is moot …?"); *id.* at 5 (third sentence in Question 6; "If the Secretary has undertaken no actions to identify such appeals [specified in the Question 6's first sentence], explain why he is contending that the [RCA] is moot."). Others pertain to characteristics of a subset of the proposed Class's members—in particular, those whose

"appeals, as of January 31, 2022, … remained closed in VACOLS and … had been closed since May 15, 2017." *Id.* at 4–5 (Matter Nos. 2 & 3). Others pertain to additional matters. *See id.* at 4–5.

On April 11, 2022, the Secretary filed not just the "affidavit or affidavits" that the Court had ordered but, instead, also what the Secretary described as a "supplemental memorandum" accompanying the affidavit. Sec'y's Resp. to the Court's Mar. 10, 2022, Order, at 1 (Apr. 11, 2022). The affidavit addresses at least to some extent the questions that the Order specifies. *See id.* Ex. 1. The Supplemental Memorandum glosses the affidavit and presents new assertions as to why, in the Secretary's view, the Court should dismiss the RCA as moot. *See id.* at 3–8.

In particular, the Secretary's counsel asserts in the Supplemental Memorandum that VA has performed certain actions since March 10, 2022, in connection with the Order; and those new actions have mooted the RCA. The Secretary states in response to Question 3 that:

> [w]hile VA does not provide notice to claimants when an appeal is closed due to a failure to file a Substantive Appeal beyond the notice provided in the SOC notice letter, the Court should still find the RCA is moot because VBA has undertaken a review of the 253,913 closed appeals identified in response to Question 1 using multiple databases, identified those appeals for which a timely Substantive Appeal was filed but not acknowledged, and has a specific plan to reactivate those appeals over the course of this fiscal year.

Sec'y's Supp. Mem. at 4.

The Secretary's counsel states in response to Question 6 that "the RCA is moot because VA has undertaken actions to address and resolve the harm identified by Petitioners, i.e., that legacy appeals have been erroneously closed in VACOLS and remain closed despite a timely filed Substantive Appeal." *Id.*; *accord id.* at 6 ("The RCA is moot because VA has reviewed all appeals closed between May 15, 2017, and January 31, 2022, for failure to file a Substantive

Appeal, identified those appeals that were improperly closed in VACOLS, established plans to reactivate those appeals during this fiscal year, and established plans to conduct monthly, special reviews to ensure the accuracy of" future such closures).

The Petitioners, J. Roni Freund and Mary S. Mathewson, on behalf of themselves and the proposed Class, respectfully respond as follows to the part of the Supplemental Memorandum that pertains to the RCA presenting a live case or controversy.[1]

ARGUMENT

The Secretary's actions since March 10, 2022, have not mooted the RCA. The Petitioners accordingly reiterate their request, for all of the reasons stated in this Response, their briefing, and at oral argument, that the Court certify the proposed Class and grant all relief, beyond reactivating Petitioners' appeals, sought through the Petition or RCA.

The standard that the Secretary must meet to establish that the RCA has become moot is stringent. A case or controversy becomes moot "only if it is impossible for [the adjudicator] to grant 'any effectual relief whatever.'" *Philbrook v. Wilkie*, 32 Vet. App. 342, 345 (2020) (quoting *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019)). The term "any effectual relief" is broad. In an individual (non-class) matter where the Secretary provides the claimant with some relief, for example, "any effectual relief" embraces the claimant's right on

[1] The Petitioners do not understand the Supplemental Memorandum's remaining part, which to repeat merely adds counsel's gloss to the VA official's affidavit filed on April 11, 2022, or any fact to which the VA affiant swore, to alter that this Court should certify the proposed Class and grant all additional relief, beyond reactivating their individual appeals, that they seek through the Petition and RCA. To the contrary, this part of the Supplemental Memorandum and the affidavit confirm that, despite the Secretary's initial reluctance to supply facts as to numerosity, even just the subset of the proposed Class that the Order identifies has thousands of members. *See* Sec'y's Supp. Mem. at 5 & Ex. 1 ¶ IX.

remand to expeditious treatment. *See Bailey v. Wilkie*, 33 Vet. App. 188, 204 (2021). Put simply, whenever "there is relief that the [adjudicator] can provide" to even the one and only claimant in a non-class setting, the matter "is not moot." *Id.*

When the Secretary does not moot out a putative class action by having provided full relief to all class representatives, mooting out the action is even more difficult than it would be to moot out an individual (non-class) matter. To do so, the Secretary must show that he has provided the relief sought to each and every proposed class member. *See Wolfe v. Wilkie*, 32 Vet. App. 1, 22 (2019) (mooting the proposed Boerschinger Class "[b]ecause Petitioner Boerschinger *and his proposed class* have received or are receiving the requested relief" (emphasis added)), *rev'd on other grounds sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022).[2]

Here, for all of the reasons that the Petitioners have stated previously in this case, the Secretary has not mooted the RCA on the basis of having provided full individual relief to the Petitioners. Additionally, VA's actions since March 10, 2022, plainly do not moot the RCA.

Through the RCA, the Petitioners seek to certify a Class consisting of:

> All claimants with a timely perfected legacy appeal: (1) that is an original appeal, (2) that the Secretary has closed, (3) that remains closed, (4) that appears in VACOLS, (5) for which a copy of the substantive appeal appears in VBMS, and (6) for which VA has not issued a rating decision regarding the substantive appeal's timeliness.

RCA at 8.

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[2] The Petitioners respectfully submit that the "or are receiving" part of the mootness standard that *Wolfe* articulates is inapposite when, as here, the RCA requests "that the Court retain jurisdiction until the Secretary certifies compliance with the Court's orders in this action; Class Counsel have received a meaningful opportunity to verify that compliance; and any dispute regarding that compliance has been resolved." RCA at 29. The Petitioners also reserve the right to argue to the U.S. Court of Appeals for the Federal Circuit that the "or are receiving" part of that standard must be overturned as inconsistent with binding precedent.

As the Petitioners noted in the RCA and since, the proposed Class includes members who timely perfected a legacy appeal as long as more than a decade ago. *See id.* at 4 (noting how VA has used VACOLS since at least 2003); *id.* at 5–6 (noting how reports from as early as 2011 document persistent, widespread VA problems in maintaining VACOLS timely and accurately); RCA Reply at 4 n.2 (reiterating that the proposed Class includes members who timely perfected legacy appeals before 2015, noting that "VACOLS dates back … to … 2003."); *Solze* Notice at 3 (Mar. 24, 2022) (breaking down, by year in which the Statement of the Case was issued (from January 2011), the number of appeals that VACOLS indicates have been closed for VACOLS not reporting a timely substantive appeal, and that remain closed).

In the Order, the Court identified and sought information regarding only a subset of the proposed Class members: those whose "appeals, as of January 31, 2022, … remained closed in VACOLS and … had been closed *since May 15, 2017*." *See supra* at 2 (emphasis added). In the Supplemental Memorandum and affidavit, the Secretary reports VA undertaking action with respect to only that subset. *See* Supp. Mem. at 5 & Ex. 1 ¶ IX (describing actions as to appeals for which VACOLS showed a "possible receipt of a timely VA Form 9 from May 15, 2017, to January 31, 2022"). With respect to the proposed Class's earlier legacy appeals, the Secretary does not report having taken any action. *See id.*

Meanwhile, as the Secretary's recent response to counsel's December 2020 Freedom of Information Act request shows, the Secretary has closed, and has kept closed, thousands of appeals for which the Secretary had issued a Statement of the Case before February 23, 2017, meaning in turn that the Secretary would have closed the appeals before May 15, 2017. *See Solze* Notice, at 3 & n.1. And, as the Petitioners noted in the RCA, they "are unaware of

any reason, and the Secretary has suggested none, why the percentage of perfected legacy appeals that VA received but erroneously closed would have changed much from, at a minimum, the start of [Fiscal Year] 2016." Reply in Support of RCA, at 3. That figure is about 18%. *See* Ex. C-14, at AppxC247 & n.3.

Accordingly, no matter what actions the Secretary has performed with respect to the proposed Class members whose appeals the Secretary closed since May 15, 2017, the Secretary has not shown that VA has provided any relief at all to more than 48% of the proposed Class's thousands of members. *See Solze* Notice, at 3 & n.1 (Mar. 24, 2022) (providing the numerical totals from which the Petitioners calculated 48%). This reason suffices by itself to show, plainly, that the RCA is not moot.

What is more, the actions that the Secretary has performed since March 10, 2022, do not moot the subset of the proposed Class's members whose appeals the Secretary closed since May 15, 2017. According to VA's affiant, on March 18, 2022, the Veterans Benefits Administration ("VBA") "initiated a special focus review of legacy appeals that were closed in VACOLS for failure to file a timely substantive appeal after issuance of" a Statement of the Case, using "data mining techniques" to identify possibly erroneously closed appeals. Sec'y's Supp. Mem., Ex. 1 ¶ IX. Those data mining techniques were, "specifically[,] pulling historic appeals tracking data from VACOLS and VBMS and performing a match function to a broader VBMS document tracking source of Veterans' records and timeliness of actions in these systems." *Id.*

VA's affiant provided no further details as to what "tracking data from VACOLS and VBMS" the VBA used here. He provided no explanation of the "match function," including

what parameters VBA considered to constitute a "match" (or not). He neither identified nor even described whatever "broader VBMS document tracking source" VBA employed. He also provided no explanation of what other databases VBA could have searched, why VBA did not search them, what additional parameters VBA could have used to search, why VBA did not use them, or what if any quality control VA ran on the search parameters or the information searched. *See id.*

To the contrary, the affiant reported only that VA's Office of Administrative Review ("OAR") accepted those approximately 5,500 search results as the given universe of what to review further; and that OAR reviewed just them. *See id.* Among the search results that OAR reviewed, the affiant reports, OAR determined that VA timely had received the substantive appeal and erroneously closed the appeal in **69.8%** of cases.

The affiant provided no reason to believe that, if the searching that the Secretary has performed since March 10, 2022, missed any potentially erroneously closed appeals, the missed set of appeals would be free of erroneous closures. Nor, the Petitioners respectfully submit, is it reasonable to conclude when 69.8% of appeals that the searching identified to warrant OAR review were indeed closed erroneously, that all closures would be error-free among appeals within the searching's substantive parameters that the searching failed to identify.

The Supplemental Memorandum does not fill any of the affidavit's informational gaps. It instead merely puts the proverbial lipstick on the pig, voicing only rhetoric as to the new actions' completeness. It also thus does not demonstrate any part of the RCA to be moot.

Accordingly, the Secretary has not shown that VA's actions since March 10, 2022, have identified—for VA to start providing relief—the entirety of even the subset of proposed Class members whose appeals the Secretary erroneously closed since May 15, 2017.

The Secretary's actions since March 10, 2022, also have not mooted the RCA even as to the thousands of May 15, 2017-forward proposed Class members whose erroneously closed appeals the Secretary now has identified. VA's affiant describes the steps that VA will take now that it has identified these appeals, only as that "VBA will reactivate the legacy appeals record in VACOLS and take appropriate next steps" and that "VA anticipates that … these actions will be completed by no later than the end of fiscal year 2022." *Id.*

The affiant's statements promise no notice and no progress reporting or other form of transparency. *See id.* The RCA seeks a Court order granting both items of relief, *see* RCA at 28–29, which would be effectual relief for reasons including that it would help to monitor the Secretary's progress in completing the promised actions and to cure what the Petitioners argue is an unlawful deprivation of notice that VA closed the appeals through an automated system.

The affiant's statements also are devoid of details that would be of any use in assuring that all of the proposed Class members whose erroneously closed appeals VA's new searching has identified and for whom VA's affiant promises relief, will actually receive relief or by when. They provide no details regarding who within VBA will reactivate the appeals—or how anyone within VBA could do so given that access to reactivate an appeal in proposed Class members' procedural posture is restricted to Board staff. *See* Ex. C-15, at AppxC252 ("RO users can only reactivate a VACOLS record that was closed out in the pre-*Form 9* stage."). The affiant's statements also provide no details regarding how, when the original claimant has died, VA will

proceed in connection with potential substitute claimants; or how VA will prioritize among proposed Class members when reactivating the appeals. And they provide no details regarding what, if any, quality-control checking VA will perform.

With respect to when VA will provide relief, the affiant has provided nothing stronger than what VA currently "anticipates." VA's "anticipate[d]" timeframes frequently slip. What is more, the affiant provided no details regarding on what basis "VA anticipates that … these actions will be completed," for just those 3,806 appeals that VBA concedes were erroneously closed, "by no later than the end of fiscal year 2022." There is, for example, no commitment of work-hour numbers or personnel, no estimate of how long each reactivation will take, and no explanation why VA does not anticipate completing these actions sooner. More is needed.

The Petitioners have requested that this Court, in addition to certifying this action as a class action, order the parties to confer regarding how to ensure that the Secretary identifies and takes action with respect to each erroneously closed appeal within the proposed Class definition. *See* RCA at 28–29. All of the above gaps in VA's affidavit illustrate why this request is so important. The affiant's sparse information provides no comfort that VBA has identified anywhere close to even the subset of the proposed Class members whose appeals VBA in March 2022 set out to identify and to start getting back on track. Instead, the affiant describes only what appears to be a limited search, of information that the affiant has not shown to reflect all of what VBA should be searching, and with apparently zero quality-checking of the search parameters or databases, that even still located for OAR review thousands of appeals. Among which, to repeat, the Secretary erroneously closed and withheld all action in **69.8%**.

Plainly, if VBA missed some information source in its limited searching, or some other problem caused the searching to miss cases, VBA will have missed additional Class members. And, although the Secretary's counsel describes the VA affiant's unexplained "anticipat[ion]" as "a specific plan," Supp. Mem. at 4, it is not. A "plan" is "a method of achieving something that you have worked out in detail beforehand." *Merriam-Webster Dictionary Online*. What the affiant has provided is mere hopes and hand-waving.

The meet-and-confer process that the Petitioners continue to request would address, and they hope would resolve, concerns of precisely the kind that the VA affiant's sparse response leave outstanding. Ordering the parties to undertake that mutual, good-faith process, rather than blindly accepting the unilateral and facially suspect limited searching that the Secretary has presented as complete, would provide the Petitioners, on behalf of the proposed Class members, with effectual relief. The RCA, to repeat, is not moot.

CONCLUSION

For all of these reasons, the Secretary's actions since March 10, 2022, have not mooted the RCA. For all of the reasons that the Petitioners have presented in their prior briefing and at oral argument in this case, neither did the Secretary's actions prior to March 10, 2022. The Petitioners accordingly reiterate their request, for all of the reasons stated in this Response, their briefing, and at oral argument, that the Court certify the proposed Class and grant all relief, beyond reactivating Petitioners' appeals, sought through the Petition or RCA.

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Respectfully submitted,

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